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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JONATHAN M., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ERIKA R.,

Defendant and Appellant.

D060687

(Super. Ct. No. SJ12381)

APPEAL from orders of the Superior Court of San Diego County, Garry G. Haehnle,
Judge. Affirmed.

Erika R. appeals orders terminating her parental rights to her son, Jonathan M., and
an order summarily denying her petition under Welfare and Institutions Code section 388¹
in which she sought to change the order terminating her reunification services and to order

¹ Statutory references are to the Welfare and Institutions Code.

further services. She contends the court abused its discretion and violated her right to due process by summarily denying her section 388 petition. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2010, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of newborn Jonathan under section 300, subdivision (b) based on Erika's methamphetamine use. She had tested positive for methamphetamine when pregnant with Jonathan, she admitted she had a history of drug use and used while pregnant, she had little prenatal care and her other children were not in her care because of her drug use. The court ordered Jonathan detained.

At the jurisdiction and dispositional hearings, the court found the allegations true and assumed jurisdiction. It declared Jonathan a dependent of the court, ordered him placed in foster care and ordered reunification services and supervised visits for Erika. Erika's reunification services included supervised visitation, counseling, parenting education, home services where appropriate, a drug treatment program and 12-step program as recommended by the drug treatment program or the social worker and drug testing.

During the first several months, Erika participated in her services plan. She began therapy in July 2010. Her therapist said she was addressing many of her issues and had met most of her therapy goals related to drug use, but she needed help in dealing with her depression. Her last therapy appointment was on December 17 and her next appointment was scheduled for January 21, 2011, after her therapist returned from vacation. Erika completed a parenting class and, in October 2010, completed the KIVA residential drug treatment program. She then moved to Tijuana, planning to return to San Diego twice each

week for visits with Jonathan. However, she began missing visits and stopped communicating with the social worker. In December, she contacted the social worker and a visit was scheduled for December 17, but Erika did not appear for the visit and did not see Jonathan again until early May 2011.

The social worker reported that on February 1, 2011, Erika called and said she had started using methamphetamine again in December and had used it daily for the last three weeks. Erika said she planned to attend drug court and would attend an orientation for an out-patient treatment program. The social worker referred her to San Diego County Mental Health Services for an assessment. Erika, however, did not follow through with these plans. The social worker recommended terminating reunification services and setting a section 366.26 hearing.

At the six-month review hearing in April 2011, the court found Erika had not made substantive progress with the provisions of her services plan, terminated services and set a section 366.26 hearing.

The social worker assessed Jonathan as adoptable. His maternal grandparents, who were the legal guardians of his three older siblings, wanted to adopt him and his foster parents were willing to adopt him as well. A contested hearing was set for August 29, 2011.

On August 15, 2011, Erika petitioned under section 388, requesting the court vacate its previous order terminating reunification services and order further services for her. She said she had entered Alcance Victoria/Victory Outreach (Victory Outreach), and was attending Alcoholics Anonymous (AA) meetings. After reviewing Erika's petition, the social worker's report, a letter from the director of Victory Outreach and a record of Erika's

AA attendance, the court summarily denied the petition, finding Erika had not shown prima facie evidence of changed circumstances or that reinstituting services would be in Jonathan's best interests. The court terminated parental rights and referred Jonathan for adoption.

DISCUSSION

I

Erika contends the court abused its discretion by denying her an evidentiary hearing on her section 388 petition.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . .
[¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held"

To obtain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

" ' "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." ' [Citations.]" (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.)

However, the juvenile court has discretion to summarily deny a petition if the moving party has not met the threshold burden of proof. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Erika has not shown the court abused its discretion by summarily denying her petition. The social worker advised Erika that she needed to enroll in a drug rehabilitation program where she would receive treatment and professional help focusing on her drug addiction. But she did not enter a rehabilitation program, but remained in Victory Outreach. The court considered a letter from the director of Victory Outreach supporting Erika's petition, which stated:

"[Erika] has continued to demonstrate what it takes to be an overcomer. . . . She has become a role model for many of [] our residents. In my opinion she has a great deal of potential and if given the opportunity, with God in her life, she will surely succeed and be a benefit to our community and abroad."

This letter does not indicate changed circumstances. It does not address Erika's progress in overcoming her drug addiction. The director explained Victory Outreach is a Christian oriented ministry that focuses on substance abuse, alcoholism, gang violence and other life controlling habits and assists families and individuals impacted by drugs and alcohol abuse, but it is "not a treatment program." The social worker noted that residents of Victory Outreach were not required to participate in AA/Narcotics Anonymous meetings and it did not offer clinical counseling, drug testing or support groups. Erika had attended 11 AA meetings, but these meetings focused on alcohol addiction, rather than drug addiction. She had not been required to drug test, and the court noted it had no drug tests to verify her claim of sobriety. The court stated Victory Outreach had not offered anything "supporting what she's been doing, how she's doing in the program."

Erika urges that she showed changed circumstances because she was having more consistent and appropriate visits with Jonathan. However, the issue in the case was her inability to provide appropriate care because of drug addiction, not the quality of her visits. The fact her visits had been more consistent since her services were terminated did not provide any evidence of a change related to the protective issue of her drug addiction.

Erika's reliance on *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 (*Jeremy W.*) does not aid her cause. In *Jeremy W.*, this court stated that in order to be entitled to a hearing on a section 388 petition, the petitioner is required to show " 'probable cause,' " not the probability of prevailing on the petition. (*Id.* at p. 1414.) The court stated: " '[If] the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' " (*Ibid.*)

Erika's situation is distinguishable from that of the mother in *Jeremy W.* There, this court found an abuse of discretion in the juvenile court's failure to grant an evidentiary hearing on a section 388 petition when the parent had provided uncontradicted declarations showing a change in the single negative factor on which the child's dependency was based. (*Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1416.) That case focused on the lack of stable living accommodations, which could be independently verified (*id.* at p. 1415), unlike Erika's claim of rehabilitation, which is totally untested. The reasoning of *Jeremy W.* does not assist Erika.

Erika also did not make a *prima facie* showing that Jonathan's best interests would be served by granting her further reunification services.

In *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532, the appellate court listed three factors a court might consider when determining if a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reasons for any continuation of the problem; (2) the strength of the bond between the child and the caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed.

As to the first and third criteria, Erika has a serious problem with drug addiction, including a long history of drug abuse and the loss of custody of her three older children because of her addiction. She had experienced some periods of sobriety, but had relapsed. After her recent relapse, she entered Victory Outreach, which is not a drug treatment program. Her severe drug addiction had not been remedied. In view of her long history of drug abuse, she needed to enroll in an intensive drug treatment program to have a chance to make meaningful changes to her life.

As to the second factor, Jonathan did not have a strong bond with Erika. He had been removed from her care at birth. Erika had weekly appropriate visits with him, but had missed numerous visits when she was abusing drugs. According to the social worker, Jonathan did not see Erika as his maternal figure and did not show distress when he separated from her at the end of visits. The maternal grandparents wanted to adopt him and, if he were not adopted by the grandparents, his foster parents were willing to adopt him.

Jonathan needed the stability of a secure, permanent home. Erika did not show that delaying permanency for him would be in his best interests.

II

Erika also maintains the court denied her due process by summarily denying her petition.

"[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citation.]" (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.)

"The essence of due process is fairness in the procedure employed" (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.)

Erika was afforded notice and the opportunity to be heard. The court did not err by finding she did not make the required prima facie showing on her petition and denying her an evidentiary hearing. She was provided with due process.

DISPOSITION

The orders are affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.